State of California

Board of Equalization
Legal Division

Memorandum

755.0060

Mr. Gene Mayer
Valuation Division - MIC:61

Date: May 10, 1994

From: Eric Eisenlauer

Subject: Request for Opinion on Assessment Jurisdiction of Smart SMR of California, Inc. (dba: Nextel Communications) No. 3422

This is in response to your memo of April 25, 1994 to Richard Ochsner in which you request our opinion as to whether the Board has jurisdiction to assess the property of Smart SMR of California, Inc. in view of the following facts set forth in your memo.

Smart SMR of California, Inc. is a subsidiary of Nextel Communications, Inc. The Valuation Division set up Smart SMR of California, Inc. (dba: Nextel Communications) No. 3422 (Nextel-Smart SMR) as a state assessee beginning with the 1994 lien date. This original determination was based on information received over the telephone on several occasions in October 1993 from Nextel's Tax Manager, Florence Chau, that Nextel-Smart SMR provides paging, dispatch, and mobile radio services to the general public. Nextel-Smart SMR was informed by telephone on October 26, 1993 that it will be state assessed, and the assessee did not raise any objection regarding the assessment jurisdiction. In fact, the assessee's February 21, 1994 letter to the Fresno County Assessor informing the local assessor that the company is state assessed clearly indicated there was no objection to the Board's jurisdiction.

On December 31, 1993, the Board mailed the 1994 property statement forms, instructions and official request to Nextel-Smart SMR. On March 1, 1994, we received a letter from Ms. Chau of Nextel dated February 28, 1994 stating that it will file with the local county assessors instead of with the Board. On March 9, 1994, the staff telephoned Ms. Chau advising her that only the Board (as opposed to the assessee) is given the

authority to make the determination regarding the assessment jurisdiction pertaining to utility property.

On March 11, 1994, a telephone call was received from Mr. Brian Davis, Nextel's Director of Taxes. He informed the staff that Ms. Chau has not been given the authority to agree to the staff determination and that Nextel-Smart SMR is not regulated by the CPUC and therefore should not be state assessed. The staff informed him that a regulated telephone utility could be under either state or federal regulation. A letter was sent to Mr. Brian Davis of Nextel in response to the 2/28/94 letter from Ms. Chau and to confirm the March 11, 1994 telephone conversation.

On April 21, 1994, the staff received a letter dated April 15, 1994 from Mr. Brian Davis of Nextel responding to the staff's March 22, 1994 letter. Mr. Davis stated in his letter that Nextel-Smart SMR is not licensed nor regulated as a common carrier by the Federal Communications Commission (FCC) but rather as of January 1, 1994, was licensed as a private land mobile service under 47 U.S.C. Section 332. He further stated that the California Public Utilities Commission (CPUC) does not regulate Nextel-Smart SMR.

You request answers to the following questions to determine the assessment jurisdiction for Nextel-Smart SMR in light of the additional information provided by the assessee.

1. If a telephone company does not have a Certificate of Public Convenience and Necessity (CPCN) from the CPUC but has an FCC license, is common carrier status under the FCC required for the Board's assessment jurisdiction?

2. If a telephone company provides mobile radio services to the general public but is not required to obtain a CPCN from the CPUC nor licensed as a common carrier by the FCC, can such a company be classified as a telephone public utility and be assessed by the Board for property tax purposes?

These two questions are really one question, i.e., whether a telephone company must be licensed as a communications common carrier by the FCC in order to be a "regulated telephone company" under federal law and thus subject to the Board's assessment jurisdiction under Article XIII, section 19 of the California Constitution.

As indicated in our memo to your of February 7, 1994, on this subject, the answer to that question has historically been "yes". As further pointed out in that memo, we said that any departure from the Board's historical practice should be based on either express legislation or an administrative regulation. That is still our view.

We assume that your concern here is based on the assertion by Nextel's employee that Nextel-Smart SMR provides paging, dispatch, and mobile radio services to the general public and yet is licensed by the FCC as a private land mobile service and not as a common carrier.

For a good discussion of the common law distinction between common carriers and private carriers see *National Association of Regulatory Utility Commissioners v. Federal Communications Commission* (1976) 525 F.2d 630, 640-642. In that case, the court upheld the FCC's classification of SMRs as non-common carriers but noted that its holding was subject to future challenge and that the FCC's Order was open to renewed attack if it is later concluded that SMRs are in fact common carriers. The following statement by the court at page 642 summarizes the distinction between private and common carriers:

> Moreover, the characteristic of holding oneself out to serve indiscriminately appears to be an essential element, if one is to draw a coherent line between common and private carriers. The cases make clear both that common carriers need not serve the whole public, [footnote omitted] and that private carriers may serve a significant clientele, apart from the carrier himself. [Footnote omitted.] Since given private and common carriers may therefore be indistinguishable in terms of the clientele actually served, it is difficult to envision a sensible line between them which does not turn on the manner and terms by which they approach and deal with their customers. The common law requirement of holding oneself out to serve the public indiscriminately draws such a logical and sensible line between the two types of carriers.

Although the distinction between a common carrier and private carrier may be, in some instances, an elusive one, the notion that a private carrier may serve a significant portion of the public is not new. See e.g., *Home Insurance Co. v. Riddell*, 252 F.2d 1 (5th Circ. 1958). As you can see, this case predates the Delaney memo attached to our February 7 memo and

cited for the Board's historical position that to be a "regulated telephone company" under federal law, a company must be a communications common carrier. Thus, the mere fact that a private carrier currently provides telephone service to the general public affords no basis for departing from the Board's historical practice.

As indicated above, Mr. Davis of Nextel says that Nextel-Smart SMR is not licensed by the FCC as a common carrier but rather as a private land mobile service under 47 U.S.C. section 332. That section, as amended by the Omnibus Budget Reconciliation Act of 1993 (Pub.L. 103-66) effective August 10, 1993, provides that a person engaged in the provision of a service that is a private mobile service shall not be treated as a common carrier for any purpose under Chapter 5 -- Wire or Radio Communication. (47 U.S.C.A. § 332 subd. (c)(2).)

The term "private mobile service" is defined to mean "any mobile service (as defined in section 153(n) of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission." (47 U.S.C.A. §332, subd. (d)(3).)

A person engaged in the provision of a service that is a commercial mobile service shall, subject to specified exceptions, be treated as a common carrier. (47 U.S.C.A. §332, subd. (c)(1).)

The term "commercial mobile service" is defined to mean "any mobile service...that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission." (47 U.S.C.A. §332, subd. (d)(1).)

The term "interconnected service" is defined to mean "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section." (47 U.S.C.A. §332, subd. (d)(2).)

Under the foregoing provisions, if Nextel-Smart SMR is, in fact, licensed by the FCC as a private mobile service rather than as a commercial mobile service as those terms are defined above and as Mr. Davis has represented, then Nextel-Smart SMR is not a common carrier as provided under 47 U.S.C.A. section

332, subdivision (c)(2) and thus is not a "regulated telephone company" under federal law. If Nextel-Smart SMR also is not regulated as a public utility telephone company by the CPUC as Mr. Davis states, then it is not subject to Board assessment jurisdiction.

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